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# In the Supreme Court of the United States

OCTOBER TERM, 1945

THE TRAILMOBILE COMPANY AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL WORKERS OF AMERICA, U. A. W.-C. I. O. LOCAL NO. 392, PETITIONERS

*v.*

LAWRENCE WHIRLS

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT

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Respondent Lawrence Whirls entered the employment of the Highland Body Manufacturing Company in 1935. He entered the military service of the United States in 1942, was honorably discharged therefrom and in May 1943 returned to his position, as an employee of Highland Body Manufacturing Company (R. 64). The Highland Body Manufacturing Company and petitioner, The Trailmobile Company, were two corporations manufacturing the same commodities in two sepa-



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rate plants in Cincinnati, Ohio (R. 63). The Highland Company was a wholly-owned subsidiary of The Trailmobile Company. During 1943 a plan of consolidation of the two companies was executed whereby The Trailmobile Company took over the assets and business of the Highland Company and agreed to assume, pay and carry out all obligations of the latter (R. 63). The transaction was effective on January 1, 1944, and the employees of the Highland Company were transferred to the payroll of The Trailmobile Company (R. 63). On the last full year of independent operation, 1942, the Highland Company had roughly 100 employees and The Trailmobile Company had approximately 1,000 employees (R. 63). The employees of both companies prior to the consolidation were affiliated with the American Federation of Labor (R. 64). Following the consolidation, a controversy as to the respective seniority rights of both groups of employees was submitted to the national representatives of the American Federation of Labor and that body decided that all employees of both companies under the consolidation "should rate seniority" as of the date they had been employed by their respective companies (R. 64). The employees of The Trailmobile Company then reorganized as a unit of the C. I. O. and in an election, the C. I. O. local was selected as the bargaining representative (R. 3). It negotiated a contract with The Trailmobile Company

about July 1, 1944 (R. 64), which fixed the seniority rights of the Highland Company's employees, regardless of their date of employment, as of January 1, 1944 (R. 64). The agreement further provided that within one year all employees must become affiliated with the C. I. O. Union, thus effecting a closed shop (R. 64).

A class suit in the state court of Ohio was brought by one Hess, a former employee of the Highland Company, seeking to enjoin the C. I. O. Union and The Trailmobile Company from carrying out the seniority provisions of the new agreement (R. 64). The basis of his claim was that under the National Labor Relations Act, an employment agreement whereby the employers have bartered away the established rights of the minority of employees for the benefit of the majority is invalid (R. 64). Both the Court of Common Pleas and the Court of Appeals of Ohio decided the Hess case adversely to the contention of the former Highland employees (R. 52–55). The Supreme Court of Ohio refused to review the case (R. 64).

Complying with the closed shop provisions of the Union contract, Whirls joined the United Automobile Workers-C. I. O. in June of 1945 (R. 64). His reduction in seniority occurred 14 months after he returned to his former position (R. 64). Represented by the United States Attorney, pursuant to Section 8 ( e) of the Selective

Training and Service Act of 1940, as amended, respondent brought suit in the United States District Court for the Southern District of Ohio against The Trailmobile Company, alleging violation of his seniority status conferred upon him by the Selective Training and Service Act (R. 55–58). He prayed for a mandatory injunction restoring him to the seniority as of the date of his original employment, February 8, 1935 (R. 58). Petitioner U. A. W.-C. I. O. Local 392 was permitted to intervene and it filed an answer praying that the complaint be dismissed (R. 59). Findings of fact and conclusions of law were made by the District Judge (R. 63–66). He entered a judgment on December 20, 1945, directing that The Trailmobile Company reinstate the seniority of respondent as of February 8, 1935, and cancel the present seniority status of January 1, 1944 (R. 67). Both petitioners appealed (R. 67, 68). On appeal the Circuit Court of Appeals for the Sixth Circuit affirmed, holding that the provisions of Section 8 (b) and (c) of the Selective Training and Service Act of 1940, which required that a veteran be restored to his former job without loss of seniority, precluded a collective bargaining agreement from whittling down the veteran's seniority, notwithstanding the fact that more than a year had passed after his return to the job (R. 75–76). It further held that the right of the respondent to his seniority continued to be protected

by the Selective Training and Service Act, notwithstanding the consolidation of the Highland and Trailmobile Companies, because The Trailmobile Company assumed all obligations of the Highland Company and one of these obligations was to continue the seniority status of Whirls (R. 78-79). Finally it rejected the contention that the class suit brought by Hess in the state courts of Ohio was *res judicata*. In that aspect of the case, it held that Hess was not in a position to bring a representative suit which would bind respondent Whirls insofar as the seniority conferred upon him by the Selective Training and Service Act was concerned.

Petitioners, in the petition filed herein, have abandoned the second and third ground urged before the court below and present one question only, namely, whether Section 8 (b) and (c) of the Selective Training and Service Act of 1940, as amended, gives to a war veteran, who was restored to the position of employment occupied by him prior to his military service and who was continuously so employed for more than one year, the right to retain the seniority status held by him when he entered the service following that one year reemployment period notwithstanding the fact that a union, which he was compelled to join in order to retain employment, had changed the seniority provisions of his employment contract to his detriment (Pet. 2).

The decision of the court below is correct. Section 8 (b) of the Act provides that an honorably discharged serviceman who had left a permanent position with a private employer shall be restored to such position "or to a position of like seniority, status, and pay, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so." Section 8 (c) further provides that the veteran "shall be considered as having been on furlough or leave of absence during his period of active military service, shall be so restored without loss of seniority," and in addition to certain other benefits, "shall not be discharged from such position within one year after such restoration." As this Court has held, the veteran

> does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war. * * * And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, No. 970, this Term, decided May 27, 1946, pp. 6–7, slip sheet opinion.

The restoration of full seniority is clearly a benefit separate and distinct from the other benefits conferred by Sections 8 (b) and (c) and is not, therefore, controlled by the one-year guaran-

tee against discharge. From this the court below correctly reasoned that the statutory benefit conferred upon a veteran takes precedence over the general right conferred by the Wagner Act upon elected representatives to enter into collective bargaining agreements binding upon all employees; and that it does not lie within the power of the employer to join with a collective bargaining agency to bargain away the seniority status of a veteran protected by the statute. Cf. *Fishgold* v. *Sullivan Dry Dock & Repair Corp., supra.*

Contrary to petitioner's contention, the question does not appear to be of general public importance. We are unaware of any other instances whereby an employer and a union have undertaken, through a collective bargaining agreement, to destroy the seniority status of a veteran otherwise protected by the Federal Act. Moreover, the peculiar facts of this case do not suggest its frequent recurrence. There had been a merger, giving rise to sharply conflicting seniority claims (R. 3). The majority compelled a change of bargaining representation to impose its views as to seniority upon the minority. To the extent that this change was designed to discriminate against employees not previously belonging to the union, it would appear to be unlawful under *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, and *Wallace Corp.* v. *National Labor Relations Board*, 323 U. S. 248. A closed shop resulted which compelled respondent to join petitioner union if he

wished to continue to work. The situation is entirely different from one where a veteran voluntarily constitutes a particular union as his bargaining agent and a labor contract is subsequently entered into which changes his relative seniority.

There is one additional consideration which we believe should be called to this Court's attention. We are advised that under the date of April 10, 1946, respondent was advised by the Union that he was charged with conduct unbecoming a member. The grounds upon which the charge was based were (1) instituting action in a civil court without exhausting the remedies provided by the Union; (2) violating the provisions of the contract negotiated between the Union and the employer; (3) negotiating through others than the Union; and (4) conducting himself in a way harmful to the interests of the Union and its members. On April 15, the Local Union requested that The Trailmobile Company immediately suspend Whirls from work. The Company notified Whirls not to report for work and advised him he would be paid for the rest of that week. We are advised that the company has continued to keep Whirls on the payroll. We do not believe that these circumstances make the case moot. Respondent obtained a judgment below which gave him certain rights against the Company and conceivably against the Union which intervened as a defendant and so became bound by the judgment.

Cf. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, No. 970, this Term, decided May 27, 1946. Presumably, he has rights under the decision below which he can continue to assert.

Even though we appear as statutory counsel for the respondent, we would be reluctant to oppose the petition for certiorari simply to enable him to retain the advantage gained in the courts below, however correct we consider those decisions to be. But since there is no present likelihood of frequent recurrence of the specific question here presented, we feel that no large public interest would be served by further review. There will be ample opportunity for further consideration of the problem in the event that the issue should become one of general importance at a later date.

Respectfully submitted.

J. HOWARD MCGRATH,
*Solicitor General.*

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